

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAZZERICK M. ALEXANDER,

Petitioner,

ORDER

v.

15-cv-568-wmc

UNITED STATES OF AMERICA,

Respondent.

In this action, petitioner Lazzerick M. Alexander seeks resentencing under 28 U.S.C. § 2255 in light of the United States Supreme Court’s recent holding in *United States v. Johnson*, 135 S. Ct. 2251 (2015), which held that the residual clause in the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B), violates the due process clause of the Fifth Amendment. Although this is Alexander’s second motion for § 2255 relief, it is properly before this court because the Court of Appeals for the Seventh Circuit has authorized his proceeding pursuant to 28 U.S.C. § 2255(h)(2).

Under § 924(e), a defendant is subject to a significantly greater sentence if the court finds that, among other things, the defendant has three prior felonies for either a violent felony or serious drug offense. A “violent felony” is defined as a crime that carries a penalty of more than one year and:

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*

§ 924(e)(2)(B) (emphasis added). In *Johnson*, the Supreme Court found the italicized language in subsection (ii), known as the residual clause, was too vague to satisfy the due process clause of the Constitution. The Court of Appeals for the Seventh Circuit has since held that *Johnson* applies retroactively. *Price v. United States*, 795 F.3d 731, 734 (7th Cir. 2015) (“There is no escaping the logical conclusion that the Court itself made *Johnson* categorically retroactive to cases on collateral review.”).

Petitioner’s motion appears to be timely under § 2255(f)(3), which provides a one-year statute of limitation from the date the Supreme Court recognizes a new rule of constitutional law. Petitioner was charged in a one-count-indictment with unlawfully possessing two firearms and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). He was sentenced on November 7, 2007, to 225 months in prison to be followed by a five-year term of supervised release. The court applied the provisions of § 924(e) in sentencing him because petitioner had three previous convictions for “a violent felony and two felony drug distribution offenses.” (See *United States v. Alexander*, Statement of Reasons, No. 3:07-cv-00071, dkt. #59, at 3-1.) The violent felony was a conviction for first degree reckless injury, which included the elements that (1) the defendant caused great bodily harm to a human being, (2) by criminally reckless conduct, and (3) under circumstances which show utter disregard for human life. See *United States v. McDonald*, 592 F.3d 808, 811 (7th Cir. 2010) (citing *State v. Jensen*, 236 Wis.2d 521, 613 N.W.2d 170, 173 n.2 (2000)).

Although the sentencing documents are not clear, it is possible that the sentencing judge considered the first degree reckless injury conviction to fall under the residual clause. *See McDonald*, 592 F.3d at 811 (noting that a conviction for first degree reckless injury does not have “as an element the use, attempted use, or threatened use of physical force against the person of another”). The court is, therefore, inclined to agree that the rule in *Johnson* may apply here, and petitioner will be allowed to go forward on his motion.

ORDER

IT IS ORDERED that the Petitioner Lazzerick Alexander may proceed on his § 2255 motion. The government may have until October 8, 2015, in which to respond, and petitioner may have until October 22, 2015, in which to file a reply. A copy of this order shall be forwarded to the Federal Defender Services office to consider whether it may offer to assist petitioner in this matter.

Entered this 17th day of September, 2015.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge